Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

EL AMIN BASHIR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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March 13, 2006

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this Petition are:

1. Whether Federal Rule of Appellate Procedure 28 supersedes the constitutional rule of direct appeal retroactivity of *Griffith v. Kentucky*.

2. Whether the Eleventh Circuit, contrary to the other circuits, correctly precludes review of *Blakely/Booker* error in cases in which the error was not raised on direct appeal until after the decision in *Blakely* but during the pendency of the direct appeal.

3. Whether the Eleventh Circuit, on remand from this Court for reconsideration in light of *Booker*, correctly held that it need not consider the merits of *Blakely/Booker* error on direct appeal when the error was not raised in initial briefs filed prior to the decision in *Blakely*.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EL AMIN BASHIR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, El Amin Bashir, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on December 13, 2005.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit appears at App. 1a-3a of this Petition and is unpublished, but is noted at 2005 W.L. 3420262. Previously, the Court granted certiorari, vacated the Eleventh Circuit's earlier judgment and remanded for reconsideration in light of *Booker v. United States*, 543 U.S. 220 (2005). The earlier judgment of the court of appeals at App. 4a-6a of this Petition and is unpublished but noted at 116 Fed. Appx. 241.

JURISDICTION

The court of appeals entered its judgment initially on July 15, 2004. A timely Petition for Rehearing was denied on November 9, 2004, and a copy of the Order Denying Rehearing appears at App. 7a-8a to this Petition. After the Court granted certiorari, vacated and remanded, the court of appeals entered judgment on December 13, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case requires interpretation and application of the Fifth and Sixth Amendments to the Constitution of the United States. The Fifth Amendment provides, in pertinent part:

> No person shall...be deprived of life, liberty or property, without due process of law....

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....

STATEMENT OF THE CASE

A. The Basis for Jurisdiction Below

El Amin Bashir was convicted of conspiracy to possess with intent to distribute cocaine and attempting to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§846 and 841(b)(1)(A) in the United States District Court for the Middle District of Florida. The basis of federal jurisdiction in the district court was under 18 U.S.C. §3231.

B. Facts Material to the Questions Presented

Mr. Bashir and others were charged in a two-count indictment with conspiring to possess with intent to distribute at least five kilograms of cocaine, and attempting to do so, in 2002. The case related to an undercover sting operation in which agents attempted to sell drugs to Bashir. The agents' interactions with Bashir were set up by an informer who served in that capacity despite his status on supervised release without the required permission of the sentencing judge to do so. Neither drugs nor money were produced, exchanged or displayed by anyone involved. The agents arrested Bashir after he refused to conduct a

transaction at a storage facility. Bashir's case was severed for trial from the original co-defendants.

By a special verdict form, the jury found Bashir guilty on both counts but found that the quantity of cocaine involved was less than five kilograms. The jury otherwise made no finding as to the drug quantity involved.

At sentencing, the Government argued that a drug quantity of ten kilograms should be attributed to Bashir for purpose of determining his sentence under the United States Sentencing Guidelines, and Bashir objected. At trial, though, the only evidence of discussions of a quantity other than ten kilograms was of a potential two kilogram deal. The district court concluded that a preponderance of the evidence supported a cocaine quantity between 3.5 kilograms and 5 kilograms because the jury had not found that more than five kilograms were involved. However, no evidence was presented of anyone having discussed a deal for any quantity between 3.5 and 5 kilograms. The district court, utilizing the sentencing guidelines as mandatory, imposed a sentence of 142 months imprisonment in light of its conclusion that the Petitioner was due to be sentenced at a sentencing guidelines level 30 and an uncontested criminal history category IV. A guidelines sentence based on less than 25 grams of cocaine would have been calculated at level 12, *see* U.S.S.G. §2D1.1(c)(14), resulting in a guidelines range of 21 to 27 months for Petitioner, U.S.S.G. §5A. A two-kilo finding also would have produced a guidelines range less than the sentence imposed. *See* U.S.S.G. §§2D1.1(c)(6), 5A.

On appeal to the Eleventh Circuit, Petitioner did not raise an argument in his initial brief under *Apprendi v. New*

Jersey, 530 U.S. 466 (2000), in light of Eleventh Circuit precedent at the time that conclusively foreclosed *Apprendi* arguments in cases of federal sentences not exceeding the maximum authorized by statute. *See, e.g., United States v. Sanchez*, 269 F.3d 1250, 1262-70 (11th Cir. 2001) *(en banc), cert. den.*, 535 U.S. 942 (2002). After briefing and oral argument in the court of appeals, but before decision, the Court decided *Blakely v. Washington*, 542 U.S. (2004). The Petitioner promptly filed a motion for leave to file a supplemental brief to raise *Blakely*, together with a tendered supplemental brief, *see* App. 11a, App. 14, but the motion and tendered brief literally crossed in the mail with the Eleventh Circuit's July 15, 2004 opinion. Petitioner also sought rehearing in the Eleventh Circuit, seeking to raise *Blakely*. *See* App. 23a.

The court of appeals denied the Petitioner's motion for leave to file a supplemental brief on September 8, 2004, citing its previous decisions in *United States v. Levy*, 379 F.3d 1241 (11th Cir. 2004); *United States v. Ford*, 270 F.3d 1346 (11th Cir. 2001); *United States v. Ardley*, 242 F.3d 989 (11th Cir. 2001); and *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000). *See* App. 9a. The court of appeals subsequently denied the motion for rehearing. App. 7a.

The Court then granted certiorari, vacated the court of appeals' judgment and remanded for reconsideration in light of *Booker*. *Bashir v. United States*, ___ U.S. ___, 125 S.Ct. 1741 (2005). The Eleventh Circuit, though, refused to consider the merits of Bashir's *Booker* issue by again holding that it was abandoned by not being raised in the initial brief. App. 1a - 3a. This Petition follows.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Court should grant the Petition for Writ of Certiorari because the court below has held erroneously, and alone among the circuits, in this case and many others, that the failure to raise a *Blakely* argument in an initial brief filed prior to this Court's decision in *Blakely* waives the issue on direct appeal. The other circuits have resolved the same issue by reviewing the merits of such arguments on supplemental briefing or motions for rehearing, and granting relief or simply remanding for resentencing. The resulting circuit split has created real inequity in sentences between defendants within the Eleventh Circuit and those whose cases arose elsewhere in the nation.

The Court should resolve this important division among the circuits. The Eleventh Circuit's pre-*Blakely* decisions conclusively foreclosed *Apprendi* arguments in federal sentencing cases. *Blakely* held, for the first time, that the "maximum sentence" for *Apprendi* purposes is the maximum to which a defendant could be sentenced under the guidelines without resorting to facts beyond those found by a jury beyond a reasonable doubt or admitted by the defendant. Following *Blakely*, and after the court of appeals denied Petitioner's motions for supplemental briefing and rehearing, the Court held that *Apprendi* and *Blakely* apply to the United States Sentencing Guidelines and that the holding applies "to all cases pending on direct review." *Booker v. United States*, 543 U.S. 220, 268, *citing*, *Griffith, supra*.

In refusing to consider the issue, the court of appeals relied upon its prior decisions holding that Fed.R.App.P. 28(a)(5) and (j) require that any issues not specifically raised in an initial brief be deemed waived, notwithstanding *Griffith*, contrary to decisions of all other circuits to have reached the issue following *Apprendi* and *Blakely*. *See United States v. Levy*, 391 F.3d 1327, 1345 & nn. 15, 16 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc), *cert. granted*, 543 U.S. ___, 125 S.Ct. 2542, *reaffirmed*, 416 F.3d 1273 (11th Cir.), *cert. den.*, ___ U.S. ___, 126 S.Ct. 643 (2005). The Eleventh Circuit conflicts with other circuits on this important issue, elevates Rule 28 above the constitutional dimension of *Griffith*, transforms issue forfeiture into waiver and compels counsel in the circuit to brief "any claim that passes the laugh test" even if directly foreclosed by existing precedent. *Levy*, 391 F.3d at 1342-43, 1345 & n.16, 1348 (Tjoflat, J., dissenting from denial of rehearing en banc) (identifying, *inter alia*, circuit decisions conflicting with Eleventh Circuit holdings on these points).

The Fifth, Sixth and Seventh circuits conflict with the Eleventh Circuit's waiver holding on *Apprendi* and *Blakely* arguments in cases briefed prior to those decisions. *See United States v. Rogers*, 118 F.3d 466, 471 (6th Cir. 1997); *United States v. Miranda*, 248 F.3d 434, 444 (5th Cir. 2001); *United States v. Pree*, 384 F.3d 378, 396 (7th Cir. 2004). The Eleventh Circuit also conflicts with circuits that review for plain error *Blakely* issues raised for the first time by supplemental briefs. *Compare, e.g., United States v. Hembree*, 381 F.3d 1109, 1110 (11th Cir. 2004) (denying supplemental briefing on *Blakely*), *cert. granted*, ___ U.S. ___, 125 S.Ct. 2904 (2005), *cert. den.*, ___ U.S. ___, ___ S.Ct. ___, 2006 W.L.

247412 (2006), *with United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005); *United States v. Glenn*, 389 F.3d 283, 287 (1st Cir. 2004); *United States v. Satterfield*, 114 F.3d App x. 545, 2004 W.L. 2491574, at *1 (4th Cir. 2004) (unpublished); *United States v. Henningsen*, 387 F.3d 585, 591 (7th Cir. 2004); *United States v. Griffith*, 385 F.3d 124, 127 (2nd Cir. 2004); *United States v. Bodilla*, 383 F.3d 1137, 1142 n.2 (10th Cir. 2004); *United States v. Ameline*, 376 F.3d 967, 974 (9th Cir. 2004). The Eighth Circuit, even in response to a *pro se* supplemental brief raising *Blakely*, has remanded cases for resentencing consistent with *Booker*. *See United States v. Coffey*, 395 F.3d 856, (8th Cir. 2005); *United States v. Burgess*, 2005 W.L. 124523 (8th Cir. 2005) (unpublished).

Seven circuits have explicitly held, contrary to the Eleventh Circuit, that the *Griffith* rule of retroactivity prevails over the prudential doctrine that issues not raised in an initial brief are deemed abandoned. *United States v. Vazquez-Rivera*, 407 F.3d 476, 487 (1st Cir. 2005); *United States v. Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005); *United States v. Hill*, 2005 W.L. 3478099, *1, n.1 (4th Cir. 2005) (unpublished); *United States v. Garcia*, 242 F.3d 593, 599 & n.5 (5th Cir. 2001); *Oliver*, 397 F.3d at 377; *Henningsen*, 387 F.3d at 591; *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) *(en banc); United States v. Byers*, 740 F.2d 1104, 1115-16 n.11 (D.C. Cir. 1984) (Scalia, J., writing for plurality) (where decision, rendered during pendency of petition for rehearing, changed claim "from completely untenable to plausible," court bound to consider and apply change in law even if claim not raised until petition for rehearing). Despite the overwhelmingly contrary results in the other circuits, the Eleventh Circuit has refused steadfastly to reconsider its view, even on remand from this Court. *See,*

e.g., United States v. Dockery, 401 F.3d 1261, 1262 (11th Cir. 2005).

The Eleventh Circuit "is truly a minority of one on this issue." *Levy*, 391 F.3d at 1347 (Tjoflat, J., dissenting from denial of rehearing en banc). The Court should correct the Eleventh Circuit minority of one on this important issue.

The Court has vacated and remanded many cases for consideration in light of *Booker*, including on the previous certiorari petition in this case. This Court's vacaturs and remands have not resulted in any meaningful *Booker* review in the Eleventh Circuit in this or other like cases. *See, e.g., Dockery*, 401 F.3d at 1262 (refusing to consider merits of *Booker* claim because Supreme Court remand order did not specifically require it). As a result, federal criminal defendants whose cases were brought within the geographical bounds of the Eleventh Circuit are serving longer sentences than similarly situated defendants in the rest of the United States. The Court should grant review in this case to resolve this inequity of national importance. *See Johnson v. United States*, 520 U.S. 461, 556 n.16 (1997) (decrying "the actual inequity" resulting from disparate application of new rule among similarly situated defendants); *Griffith*, 479 U.S. at 327 (same).

In this case, Petitioner contested drug quantity at sentencing and raised his *Blakely* issue promptly after *Blakely* was decided, by way of seeking supplemental briefing and rehearing. The court of appeals refused to consider the issue on supplemental briefing, rehearing or remand from this Court in this case and many others,

contrary to all the other circuits. The Eleventh Circuit is wrong on the issue and conflicts directly with its sister circuits. Accordingly, the Court should grant certiorari.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

Date: March 13, 2006

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EL AMIN BASHIR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
December 13, 2005
THOMAS K. KAHN
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UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 03-13522

D.C. Docket No. 02-00115-CR-J-32-TEM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EL AMIN BASHIR,
a.k.a. Lavonne Dallas,
a.k.a. Bas,
a.k.a. Levonne Dallas
a.k.a. El Amir Bashir

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(December 13, 2005)

**ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES**

Before EDMONDSON, Chief judge, TJOFLAT and COX,, Circuit Judges.

PER CURIAM:

A jury convicted Defendant Bashir of federal drug crimes. We affirmed the conviction. United States v. Bashir, No. 03-13522, 2004 WL 1737101 at *1 (11th Cir. July 15, 2004) (Table). Bashir appealed our decision to the United States Supreme Court. The Court vacated the judgment and remanded the case to us in light of United States v. Booker, 125 S.Ct. 738 (2005). Bashir v. United States, 125 S.Ct. 1741 (2005).

Bashir raised no Booker/Blakely/Appendi issue on his initial appeal. Accordingly, no Booker issue is timely before us. United States v. Dockery, 401 F.3d 1261, 1263

(11th Cir. 20050. See United States v. Ardley, 242 F.3d 989, 990 (11th Cir. 2001) (recognizing that the Supreme Court did not indicate this Court should ignore "our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned").

On reconsideration, we affirm the conviction and sentence.

AFFIRMED.

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JULY 15, 2004
THOMAS K. KAHN
CLERK

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 03-13522

D.C. Docket No. 02-00115-CR-J-32-TEM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EL AMIN BASHIR,
a.k.a. Lavonne Dallas,
a.k.a. Bas,
a.k.a. Levonne Dallas
a.k.a. El Amir Bashir

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(JULY 15, 2004)

Before EDMONDSON, Chief Judge, TJOFLAT and Cox, Circuit Judges.

PER CURIAM:

Defendant-appellant El Amin Bashir appeals his conviction for conspiracy to and attempt to possess with intent to distribute less than 5 kilograms of cocaine. No reversible error has been shown; we affirm.

Bashir argues the district court should have granted a mistrial because of prosecutorial misconduct during closing argument because the prosecutor – without an evidentiary basis – argued the existence of a third vehicle that got away that likely contained a secret compartment for the drugs and money.[1] Our review is de novo. United States v. Noriega, 117 F.3d 1206, 1218 (11th Cir. 1997).

[1] Bashir also raises other issues on appeal. He contests the district court's answer to a jury question, the modified Allen charge given the jury initially deadlocked, the denial of his "theory of defense" instructions, the failure to dismiss his indictment because of government misconduct, and evidentiary rulings. We have thoroughly examined the issues and determine them to be without merit.

"A prosecutor's statement justifies the reversal of a conviction if it undermined the fairness of the trial and contributed to a miscarriage of justice." United States v. Hall, 47 F.3d 1091, 1098 (11th Cir. 1995) (citation and quotation omitted). To reverse a conviction for prosecutorial misconduct, two elements must be met: (1) the statements must be improper and (2) the statements must have prejudicially affected the defendant's substantial rights. Id. "A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome [of the trial] would be different." United States v. Wilson, 149 F.3d 1298, 1301 (11th Cir. 1998) (citation and quotation omitted).

Although the comments might have been improper, we cannot conclude – in light of the record as a whole – that a reasonable probability exists that but for the comments, the outcome would have been different. Bashir's substantial rights were not prejudicially affected, and we affirm.

AFFIRMED.

Entered: July 15, 2004
For the Court:: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 9 2004
THOMAS K. KAHN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-13522-II

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EL AMIN BASHIR,
a.k.a. Lavonne Dallas,
a.k.a. Bas,
a.k.a. Levonne Dallas
a.k.a. El Amir Bashir

Defendant-Appellant.

On Appeal from the United States District Court for the
Middle District of Florida

BEFORE: EDMONDSON, Chief Judge, TJOFLAT and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
CHIEF JUDGE

ORD-41

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 08 2004

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-13522-II

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EL AMIN BASHIR,
a.k.a. Lavonne Dallas,
a.k.a. Bas,
a.k.a. Levonne Dallas
a.k.a. El Amir Bashir

Defendant-Appellant.

On Appeal from the United States District Court for the
Middle District of Florida

ORDER:

Appellant's motion for leave to file a supplemental brief in order to raise an issue pursuant to Blakely v. Washington, ___U.S. ___125 S.Ct. 2531 (2004), is DENIED. See U.S. v. Ford, 270 F.3d 1346, 1347 (11th Cir. 2001); U.S. v. Ardley, 242 F.3d 989, 990 (11th Cir. 2001); U.S. v. Nealy, 232 F.3d 825, 830 (11th Cir. 2000).

/s/ J.L. Edmondson
CHIEF JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EL AMIN BASHIR,

Appellant,

vs. Appeal Docket No.: 03-13522-I

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

The Appellant, El Amin Bashir, by and through undersigned counsel, pursuant to Internal Operating Procedure 5, following Eleventh Circuit Rule 28, hereby moves the Court to enter its Order granting him leave to file a supplemental brief in this appeal. In support thereof, the Appellant states:

1. This appeal has been briefed and oral argument occurred on May 4, 2004.

2. Following the filing of the reply brief and oral argument, the Supreme Court, on June 24, 2004, decided the case of *Blakely v. Washington*, ___ U.S. ___, 2004 W.L. 1402697 (2004), which held that a sentence enhancement beyond the standard range established for an offense, in the absence of a jury finding, waiver or stipulation, violated the

defendant's right to trial by jury under the Sixth Amendment to the United States Constitution.

3. *Blakely* applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to a sentencing guidelines-type sentencing scheme in which certain factual matters were determined to establish the length an offender's sentence, but which fact were found by a sentencing judge and not a jury. *Blakely*, therefore, establishes a constitutional prohibition against application of at least certain United States sentencing guidelines in the absence of waivers, stipulations or unanimous jury determinations beyond a reasonable doubt.

4. It is necessary in the interest of justice and the provision of unconstitutionally effective assistance of counsel to raise the sentencing issue addressed in *Blakely* during the pendency of this appeal. Bashir was sentenced to 142 months' imprisonment, but under *Blakely* would only be properly sentenced to between 21 and 27 months imprisonment.

5. Appellant's proposed supplemental brief is tendered contemporaneously herewith.

6. The Appellant is incarcerated.

WHEREFORE, the Appellant respectfully requests this Honorable Court to enter its Order granting him leave to file his supplemental brief tendered herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Marcio Valladares, Esquire,** Assistant United States Attorney, 300 North Hogan Street, Suite 700, Jacksonville, Florida 32202, by United States Mail, this 16th day of July, 2004.

ATTORNEY

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NO. 03-13522-I

EL AMIN BASHIR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court
for the Middle District of Florida
Jacksonville Division

APPELLANT'S SUPPLEMENTAL BRIEF REGARDING *BLAKELY v. WASHINGTON*

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I.

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ARGUMENT

I.

THE SUPREME COURT DECISION IN *BLAKELY v. WASHINGTON* REQUIRES THAT BASHIR'S SENTENCE BE VACATED AND THIS CASE REMANDED FOR RESENTENCING.

Bashir was found guilty of conspiracy to possess with intent to distribute cocaine and attempting to possess cocaine with intent to distribute, but the jury concluded that the quantity of cocaine involved was less than five kilograms. [R. 211, 259 - 19-21]. The presentence investigation report sought to attribute ten kilograms of cocaine to Bashir, who objected to that portion of the report and requested a downward departure. [R. 242; PSI at Addendum 1]. The district court thereafter sentenced Bashir at a base offense level of 30, corresponding to a quantity of 3.5 kilograms to 5 kilograms of cocaine. [R. 243, 244 (Statement of Reasons), 249]. *See also,* U.S.S.G. §2D1.1(c)(5). Bashir's criminal history category was IV, and the district court imposed a sentence of 142 months incarceration. [R. 243, 244, 249].

The district court, without a jury, made a finding that the quantity of cocaine that was the object of the conspiracy and attempt was not less than 3.5 kilograms. The jury, however, simply made a finding that the quantity was an unspecified weight which was less than five kilograms. Because Bashir did not stipulate to a 3.5 kilogram minimum quantity, affirmatively waive his right to a jury determination of such a minimum quantity or receive a unanimous jury determination of such a minimum quantity beyond a reasonable doubt, the sentence imposed

violated Bashir's right to trial by jury under the Sixth Amendment to the Constitution of the United States. In the absence of a jury finding, waiver or stipulation to any minimum quantity whatsoever, Bashir should have been sentenced at a base offense level of 12, the lowest guidelines level for a cocaine offense. Accordingly, his sentence should be vacated and this case remanded for resentencing at offense level 12, criminal history category IV, and a range of 21 to 27 months incarceration.

Blakely v. Washington, ___ U.S. ___, 2004 W.L. 1402697 (June 24, 2004), requires the relief requested in this argument. In *Blakely*, the Supreme Court invalidated a judicial sentencing enhancement based on a finding of one or more facts not authorized by a jury verdict, stipulation or waiver. That is precisely the same sentencing scheme imposed by the United States Sentencing Guidelines, and so judge-found facts, as at Bashir's sentencing, cannot constitutionally be utilized to increase a defendant's sentencing exposure. Accordingly, the sentence imposed in this case should be vacated and this case remanded for resentencing.

As of this writing, this Court has not decided this question. The Court has held that *Blakely* does not undermine minimum mandatory sentences based on factual findings made by a district judge, *Spero v. United States*, ___ F.3d ___, 2004 W.L. 1516863 (11th Cir. July 8, 2004), and does not apply retroactively on collateral review to support a successive 28 U.S.C. §2255 motion, *In Re Dean*, ___ F.3d ___, 2004 W.L. 1534688 (11th Cir. July 9, 2004). The Seventh Circuit has found sentence enhancements based on drug quantities not found by juries, as well as obstruction of justice not found by juries, unconstitutional under *Blakely*. *United States v. Booker*, ___ F.3d ___, 2004 W.L.

1535858 (7th Cir. July 9, 2004). The Fifth Circuit has concluded that *Blakely* does not undermine the federal sentencing guidelines. *United States v. Pineiro*, ___ F.3d ___, 2004 W.L. 1543170 (5th Cir. July 12, 2004). The Second Circuit has certified to the Supreme Court, under 28 U.S.C. §1254(2), questions regarding the applicability of *Blakely* to the United States Sentencing Guidelines. *United States v. Penaranda*, ___ F.3d ___, 2004 W.L. 1551369 (2nd Cir. July 12, 2004).

As of this writing, the Supreme Court has yet to rule on the question. However, the weight of authority, and the only fair reading of *Blakely*, dictates, at the very least, that guidelines enhancements based on factfinding by individual judges violate the Sixth Amendment. Accordingly, the sentence in this case should be vacated, and the case remanded for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies, pursuant to Fed.R.App.P. 32(a)(7), that the foregoing brief contains 1,017 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing have been furnished to **Marcio W. Valladares, Esquire,** Assistant United States Attorney, 300 N. Hogan Street, Suite 700, Jacksonville, Florida 32202, by United States Mail, this 16th day of July, 2004.

ATTORNEY

lh 0353

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EL AMIN BASHIR,

Appellant,

vs. Appeal Docket No.: 03-13522-I

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

The Appellant, by and through undersigned counsel, pursuant to Fed.R.App.P. 40, hereby moves the Court to enter its Order for hearing in the above-entitled appeal. In support thereof, the Appellant states:

1. During the pendency of this appeal, the United States Supreme Court rendered its decision in *Blakely v. Washington*, ___ U.S. ___, 2004 W.L. 1402697 (June 2004). A number of courts have now held the United States Sentencing Guidelines unconstitutional under *Blakely* as violative of a defendant's right to trial by jury under the Sixth Amendment to the United States Constitution and/or have held that certain sentencing enhancements pursuant to the guidelines are unconstitutional in particular cases.

2. In light of *Blakely*, counsel for the Appellant prepared a supplemental brief for this Court, together with

a motion for leave to file said supplemental brief, to raise the *Blakely* issue in this appeal. It appears that Appellant's motion and supplemental brief literally crossed in the mail with the Court's opinion in this case.

3. The Court should grant rehearing to address *Blakely* in this case. The *Blakely* issue is apparent on the face of the record. Bashir was found guilty of conspiracy to possess with intent to distribute cocaine and attempting to possess cocaine with intent to distribute; the jury concluded that the quantity of cocaine involved was less than five kilograms but returned no verdict establishing any minimum quantity. [R. 211, 259 - 19-21]. The presentence investigation report sought to attribute ten kilograms of cocaine to Bashir, who objected to that portion of the report and requested a downward departure. [R. 242; PSI at Addendum 1]. The district court thereafter sentenced Bashir at a base offense level of 30, corresponding to a quantity of 3.5 kilograms to 5 kilograms of cocaine. [R. 243, 244 (Statement of Reasons), 249]. *See also,* U.S.S.G. §2D1.1(c)(5). Bashir's criminal history category was IV, and the district court imposed a sentence of 142 months incarceration. [R. 243, 244, 249].

4. The district court, without a jury, made a finding that the quantity of cocaine that was the object of the conspiracy and attempt was not less than 3.5 kilograms. The jury, however, simply made a finding that the quantity was an unspecified weight which was less than five kilograms. Because Bashir did not stipulate to a 3.5 kilogram quantity, affirmatively waive his right to a jury determination of such a quantity or receive a unanimous jury determination of such a quantity beyond a reasonable

doubt, the sentence imposed violated Bashir's right to trial by jury under the Sixth Amendment to the Constitution of the United States. In the absence of a jury finding, waiver or stipulation to any minimum quantity whatsoever, Bashir should have been sentenced at a base offense level of 12, the lowest guidelines level for a cocaine offense. Accordingly, his sentence should be vacated and this case remanded for resentencing at offense level 12, criminal history category IV, and a range of 21 to 27 months incarceration.

5. This case is not final on direct review. As a result, *Blakely* is applicable to this case. *See Griffith v. Kentucky*, 479 U.S. 314, 321-23 (1987).

6. In *United States v. Ameline*, 2004 W.L. 1635808 (9th Cir. July 21, 2004), the Ninth Circuit considered a *Blakely* issue raised by post-submission briefing. The *Ameline* court concluded that the *Blakely* issued raised a change in law pending appeal, a circumstance permitting consideration of an issue not previously raised. The *Ameline* court then found sentencing enchantments applied in that case under the United States Sentencing Guidelines to have violated Ameline's right to trial by jury under the Sixth Amendment where in his plea, Ameline had admitted only to a detectable amount of methamphetamine, resulting in a maximum unenhanced offense level of 12. Additionally, because Ameline had not previously raised an *Apprendi v. New Jersey* issue, the Ninth Circuit applied a plain error analysis under Fed.R.Crim.P. 52(b). In so doing, the court in *Ameline* found that the sentence imposed was error in that the district court, rather than the jury, made the factual findings supporting the sentencing enhancements under a preponderance of the evidence standard. The court also

concluded that the error was plain because the error was made clear by *Blakely* prior to the time that the appeal was final, citing *Johnson v. United States*, 520 U.S. 461, 468 (1997). The court found that the error also prejudicially affected Ameline's substantial rights because he had raised specific objections to the sentencing enhancements, which the district court resolved against his objections. Finally, the Ninth Circuit also held that the error affected the fairness of Ameline's proceedings by his sentence having ballooned, with no warning in either his indictment or plea...based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." *Blakely*, 124 S.Ct. at 2542. The court vacated Ameline's sentence and remanded the case for resentencing.

7. In conducting a plain error analysis, a defendant's substantial rights are affected when a sentence exceeds the authorized maximum. *See United States v. Hester*, 287 F.3d 1355, 1357 (11th Cir. 2002). In this case, Bashir was sentenced above the guideline range applicable on the basis of the unanimous jury verdict, which establishing nothing more than a quantity of some amount of cocaine greater than zero grams of cocaine but less than five kilograms, thus in excess of any essential fact found by the jury to warrant a base offense level greater than 12. *See Blakely*, 2004 W.L. 1402697 at *9.

8. An appellate court has the power to notice a plain error even if not raised by any party. *See Brotherhood of Carpenters & Joiners of America v. United States*, 330 U.S. 395, 412 (1947). Particularly in the case of an incarcerated

individual, the court bears an important responsibility in noticing plain errors. *See Thomas v. Crosby*, 371 F.3d 782, ___, 2004 W.L. 1162208, *____ (11th Cir. May 26, 2004) (even if this Court erred by *sua sponte* asking the parties to proceed on a different issue than raised in the briefs, any such error was not jurisdictional) (Tjoflat, J., concurring) (drawing parallel between appellate court's power when justice requires, to raise new issues and its power to notice plain error). As a result, a court's responsibility to notice plain error exists even if the parties fail to present the "right" issues on appeal.

9. The timing and content of the Supreme Court's announcement of a new rule of law in *Blakely* was unanticipated, including by every circuit to have considered the precise issue presented in *Blakely* prior to the decision in *Blakely*. In this circumstance, where a new rule of law is announced by the Supreme Court prior to the finality of direct appeal, including the opportunity to file a petition for writ of certiorari, the rationale for faulting parties for failing to raise the issue previously is simply inapplicable. The issue is not waived because Bashir did not intentionally relinquish or abandon a known right, where he could not have known of that right prior to the decision in *Blakely*. *See United States v. Olano*, 507 U.S. 725, 733 (1933) (waiver is "the intentional relinquishment or abandonment of a known right."). Forfeiture is different than waiver, and forfeited issues are subject to review for plain error. *Id.*

Griffith v. Kentucky, supra, makes new constitutional rules applicable to cases not yet final, defining final as the point in time when "the availability of appeal [is]

exhausted." *Griffith*, 479 U.S. 314, 321 n.6. At this stage of this case, the "availability of appeal" is not exhausted because this Petition for Rehearing is filed within the time for filing a petition for rehearing under Eleventh Circuit Rule 40-3 and certainly is filed prior to the expiration of time for seeking further direct review, including the date of the expiration of the time for seeking certiorari review in the supreme court. *See Kaufmann v. United States*, 282 F.3d 1336, 1339 (11th Cir. 2002) (judgment becomes "final" upon the expiration of the time to seek certiorari review in the supreme court).

10. In addition, the Court should grant rehearing in that its decision overlooked or misapprehended the tangible evidence of the district court's modified *Allen* charge having coerced the jury's verdict. The evidence of such coercion is clear, in that the evidence at trial involved discussions relating to a transaction of ten kilograms of cocaine. The jury posed a question to the district court regarding whether the Government's use of its informant under the circumstances of this case was unlawful, the district court declined to answer that question; the jury subsequently advised that it was unable to reach a unanimous verdict; the district court then administered a modified *Allen* charge; and the jury thereafter returned the verdict of guilt, but with a finding that the amount of cocaine involved was less than five kilograms. Because no evidence at trial would support a verdict of guilt involving less than five kilograms, the jurors who previously had voted for acquittal clearly were thereafter coerced by the remaining members of the jury to agree to a verdict of guilt if the verdict was predicated upon a different quantity of cocaine than was ever in evidence at trial. Accordingly, for

the foregoing reasons, the Court should grant rehearing to consider the *Blakely* issue in this case as well as the *Allen* coerced verdict issue.

Respectfully submitted,

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